Tun Dr Mahathir bin Mohamad v Tan Sri Mohd Sidek bin Hassan & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–207–08 OF 2017
AZIZAH NAWAWI J
28 AUGUST 2017

Administrative Law — Remedies — Certiorari and mandamus — Principles of natural justice — Rule against bias and prejudice — Applicant applied for order of certiorari to quash decision made by Royal Commission of Inquiry — Applicant applied for order of mandamus to compel seventh respondent to advise Yang di-Pertuan Agong to terminate appointment of first and fourth respondents — Whether there was breach of principles of natural justice premised on bias and prejudice

This was an application by the applicant for leave under O 53 r 3 of the Rules of Court 2012 to commence judicial review proceedings for an order of certiorari to quash the decision made by the Royal Commission of Inquiry ('the RCI') in dismissing the applicants application through his counsel, to disqualify the first and fourth respondents from continuing as members for the RCI and an order of mandamus to compel the seventh respondent to immediately advise the Yang di-Pertuan Agong ('YDPA') under art 40(1) and 40(1A) of the Federal Constitution to terminate the appointment of the first and fourth respondents. The first and fourth respondents were members of the 'Pasukan Penyiasatan Khas' that was tasked with the investigation and subsequent recommendation to the cabinet of the seventh respondent to establish the RCI. It was submitted by the applicant that since the first and fourth respondents had access to the documents and had made a prima facie case and/or predetermined the subject matter of the inquiry, then there would be a breach of the principles of natural justice premised on bias and prejudice.

Held, dismissing the application for leave with no order as to costs:

(1) The application for leave for judicial review did not meet the threshold requirements. The application for leave was without merit, was frivolous and vexatious and was dismissed (see paras 22 & 46).

(2) The powers on the appointment, addition or substitution of Commissioners vested in the YDPA by virtue of ss 2 and 4 of the Commissions of Enquiry Act 1950 ('the Act'). The RCI had no power on the appointment and/or removal of its Commissioners. The RCI had correctly refused to accede to the applicants' application to disqualify the first and fourth respondents (see para 29).

(3) There was no legal basis on the application for leave for an order of mandamus. An order of mandamus could only be granted where there was a legal duty imposed on the public authority but it does not perform the same. No issue of statutory duty arose in the present case as the appointment and replacement of commissioners were at the discretion of the YDPA. Furthermore, any change to the composition of the RCI was limited to the grounds as stated in s 4 of the Act where the person appointed 'dies or resigns or desires to be discharged or refuses or becomes incapable of acting' (see paras 35–37 & 43).

(4) The application for leave for an order of mandamus against the government of Malaysia was clearly misconceived as the seventh respondent was not the cabinet or the minister as specified in arts 40(1) and 40(1A) of the Federal Constitution. The cabinet or minister were not named as parties in the application (see para 39).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon untuk izin di bawah A 53 k 3 Kaedah-Kaedah Mahkamah 2012 untuk memulakan prosiding semakan kehakiman bagi perintah certiorari untuk membatalkan keputusan yang dibuat oleh Suruhanjaya Siasatan Diraja ('the RCI') dalam menolak permohonan pemohon melalui peguamnya, untuk membatalkan responden pertama dan keempat daripada terus menjadi ahli untuk RCI dan perintah mandamus untuk memaksa responden ketujuh dengan serta merta menasihat Yang di-Pertuan Agong ('YDPA') di bawah perkara 40(1) dan 40(1A) Perlembagaan Persekutuan untuk menamatkan pelantikan responden pertama dan keempat. Responden pertama dan keempat adalah ahli-ahli 'Pasukan Penyiasatan Khas' yang ditugaskan dengan penyiasatan dan cadangan kemudiannya kepada kabinet terhadap responden ketujuh untuk menubuhkan RCI. Ia dihujahkan oleh pemohon bahawa memandangkan responden pertama dan keempat mempunyai akses kepada dokumen-dokumen dan telah membuat kes prima facie dan/atau menentukan terlebih dahulu perkara siasatan, dengan itu akan terdapat pelanggaran prinsip-prinsip keadilan semula jadi berdasarkan berat sebelah dan prejudis.

Diputuskan, menolak permohonan untuk izin tanpa perintah terhadap kos:

(1) Permohonan untuk semakan kehakiman tidak memenuhi kehendak ambang. Permohonan untuk izin adalah tanpa merit, remeh dan menyusahkan dan ditolak (lihat perenggan 22 & 46).

(2) Kuasa pelantikan, tambahan atau penggantian pesuruhjaya-pesuruhjaya diletakhak ke atas YDPA mengikut ss 2 dan 4 Akta Suruhjaya Siasatan 1950 ('Akta'). RCI tidak mempunyai kuasa atas pelantikan dan/atau penyingkiran pesuruhjaya-pesuruhjayanya. RCI telah secara betul menolak untuk bersetuju kepada permohonan pemohon untuk

membatalkan responden pertama dan keempat (lihat perenggan 29).

(3) Tidak terdapat asas undang-undang atas permohonan untuk izin bagi perintah mandamus. Perintah mandamus hanya boleh diberikan di mana terdapat tugas undang-undang dikenakan ke atas pihak berkuasa awam tetapi ia tidak melakukannya. Tiada isu tugas statutori berbangkit di dalam kes ini memandangkan pelantikan dan penggantian pesuruhjaya-pesuruhjaya adalah atas budi bicara YDPA. Selanjutnya, apa-apa pertukaran kepada komposisi RCI adalah terhad kepada alasan-alasan yang dinyatakan di dalam s 4 Akta di mana orang yang dilantik 'dies or resigns or desires to be discharged or refuses or becomes incapable of acting' (lihat perenggan 35–37 & 43).

(4) Permohonan untuk izin bagi perintah mandamus terhadap kerajaan Malaysia adalah jelas salah tanggap memandangkan responden ketujuh bukan kabinet atau Menteri seperti yang ditetapkan di dalam perkara-perkara 40(1) dan 40(1A) Perlembagaan Persekutuan. Kabinet atau menteri tidak dinamakan sebagai pihak-pihak di dalam permohonan (lihat perenggan 39).]

Notes

For cases on certiorari and mandamus, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 842–847.

Cases referred to

Application by Ong Eng Guan for an Order of Prohibition in Re Appointment of SHD Elias, In Re [1959] 1 MLJ 92, FC (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)

Loh Wai Kong v Government of Malaysia & Ors [1978] 2 MLJ 175, HC (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (folld)

Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)

Pergamon Press Ltd, Re [1970] 3 All ER 535, CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Workon Sdn Bhd v The Director of Lands & Surveys, Sabah [1999] 4 MLJ 177, HC (refd)

Legislation referred to

Commissions of Enquiry Act 1950 ss 2, 4, 18
Courts of Judicature Act 1976 Schedule
Federal Constitution arts 5(1), 8(1), 40(1), (1A)
Rules of Court 2012 O 53, O 53 rr 1, 1(1), (2), 2, 2(2), 3, 4, 5
Specific Relief Act 1950 s 44(1), Chapter VIII

Mohamed Haniff bin Khairi Abdulla (Muhammad Rafique Rashid Ali, Fahmi Abd Moin and Ahmad Bazlan Che Kassim with him) (Haniff Khatri) for the applicant.
Amarjeet Singh a/l Sarjit Singh (Suzana Atan and Ahmad Terriruddin Mohd Salleh with him) (Senior Federal Counsel, Attorney General's Chamber) for the Attorney General's Chambers.

Azizah Nawawi J:

APPLICATION

[1] The applicant's application is for leave under O 53 r 3 of the Rules of Court 2012 ('the ROC 2012') to commence judicial review proceedings for the following prayers:

(a) an order of certiorari to quash the decision made by the Royal Commission of Inquiry ('the RCI') in dismissing the applicant's application through his counsel, to disqualify the first and the fourth respondents from continuing as members for the RCI; and

(b) an order of mandamus to compel the seventh respondent to immediately advice the Yang di-Pertuan Agong ('YDPA') under art 40(1) and (1A) of the Federal Constitution to cancel or terminate the appointments of the first and the fourth respondents.

[2] The applicant also seeks an order of stay under O 53 rr 4 and 5 of the ROC 2012 to suspend the respondents from sitting as members of the RCI and proceeding with the hearing.

[3] The grounds of the application are:

(a) that the composition of the RCI is in breach of natural justice as both the first and the fourth respondents were members of the 'Pasukan Penyiasatan Khas' ('the task force') that was tasked with the investigation and subsequent recommendation to the cabinet of the seventh respondent to establish the RCI to investigate into the losses incurred by Bank Negara Malaysia ('the BNM') in the 1990s;

(b) that since both the first and the fourth respondents have had access to the evidence before the task force resulting in the recommendation, the first and the fourth respondents should be disqualified from being members of the RCI because all members of the RCI should be free from any pre-determination and/or prejudice; and

(c) that, as a person 'who is in any way implicated or concerned in the matter under enquiry' under s 18 of the Commissions of Enquiry Act 1950 ('Act 119') the applicant's fundamental rights under arts 5(1) and/or 8(1) of the Federal Constitution will be affected if the rules of natural justice is not followed.

[4] Having considered the application and the submission of the parties, this court had dismissed the application for leave with no order as to costs.

THE SALIENT FACTS

[5] The applicant was the Prime Minister of Malaysia from 1981–2003.

[6] The first to the fifth respondent have been appointed by the YDPA as the commissioners of the RCI which was established to enquire into the 'Kerugian Akibat Urus Niaga Mata Wang Asing Oleh Bank Negara Malaysia Sekitar Tahun 1990-an' ('the subject matter').

[7] The sixth respondent had been appointed as the Secretary of the RCI, whilst the seventh respondent is the Government of Malaysia.

[8] In his affidavit affirmed on 9 August 2017, the applicant narrates the background facts to the application to be as follows:

(a) that on 28 January 2017, a former Assistant Governor of Bank Negara, Datuk Abdul Murad raised 'satu isu lapuk berkenaan kerugian AS$10 billion dolar melalui kegiatan perdagangan mata wang oleh Bank Negara Malaysia (BNM) sepanjang 1991 hingga 1993';

(b) on the same day, 28 January 2017, the *Utusan Online* reported calls from several non-governmental bodies to investigate the subject matter;

(c) on the next day, the Honourable Prime Minister is reported in the *Free Malaysia Today* ('FMT') to have made the following statement:

> The Cabinet will seek the opinion of Bank Negara Malaysia (BNM) on the alleged foreign exchange losses of US 10 billion dollar (worth RM44 billion now) in the early 1990s before taking any further action;

(d) on 6 February 2017, FMT also reported that Khairul Azwan Harun, Timbalan Ketua Pemuda UMNO have made the following statement:

Umno Youth urges that a royal commission of inquiry be set up to investigate whether Bank Negara almost went bankrupt in 1991 due to forex trading exposures amounting to US$150 billion (RM664 billion) and forex trading losses of US$30 billion;

(e) on 7 February 2017, FMT further reported as follows:

KUALA LUMPUR: Datuk Seri Salleh Said Keruak menyifatkan Tun Dr Mahathir Mohamad dan Lim Kit Siang tidak membuat perbandingan sewajarnya apabila menyatakan Suruhanjaya Siasatan Diraja (RCI) diperlukan hanya untuk skandal Bumiputra Malaysia Finance (BMF) dan tukaran asing Bank Negara malah 1 Malaysia Development Bank (1MDB);

(f) on 8 February 2017, Malaysia kini reported as follows:

Kerajaan mempertimbangkan kemungkinan menyiasat semula dakwaan Bank Negara Malaysia (BNM) pernah mencatat kerugian sebanyak RM44 billion melalui kegiatan perdagangan mata wang sepanjang 1991 hingga 1993, kata Menteri Belia dan Sukan Khairy Jamaluddin.

...

Apa yang perlu difikirkan adalah sama ada kita perlu melihat semula kes ini dan mendapat kepastian sama ada berlaku 'cover up' atau usaha menutup kes tersebut dan jika sekiranya ada cover up, siapa yang terlibat dan siapa yang mengarahkannya ... itu persoalan paling penting yang perlu kita dapat kepastian ketika ini,' katanya, hari ini ...

[9] In view of the above sequence of events, the applicant states that it came as no surprise when the Prime Minister Department issued a press statement on 15 February 2017, which reads as follows:

Kabinet hari ini bersetuju menubuhkan sebuah Task Force untuk menjalankan siasatan awal berkenaan kerugian urus niaga wang asing oleh Bank Negara Malaysia pada sekitar 1990-an.

...

Penubuhan Task Force ini merupakan langkah permulaan untuk mendapatkan semua fakta-fakta yang berkaitan — menganalisis semua Hansard resmi mesyuarat-mesyuarat Parlimen pada masa itu, minit-minit Mesyuarat Kabinet yang terdahulu, laporan Ketua Audit Negara, Bank Negara Malaysia dan laporan-laporan lain daripada agensi-agensi yang berkenaan.

...

Task Force ini akan mengemukakan syor dan cadangan untuk dipertimbangkan dalam tempoh terdekat dan tindakan selanjutnya termasuk penubuhan Suruhanjaya Siasatan Diraja (RCI) jika perlu berdasarkan hasil siasatan itu nanti ...

[10] On 14 March 2017, *FMT* reported that members of the task force include the first respondent, Tan Sri Mohd Sidek bin Hassan (Chairman of the

task force) and the fourth respondent, Tan Sri Saw Choo Boon. The first respondent is reported to have said as follows:

> Pasukan ini juga, katanya, akan mengemukakan syor kepada kerajaan mengenai tindakan susulan, termasuk penubuhan suruhanjaya siasatan diraja, jika perlu, berdasarkan hasil siasatan tersebut.

[11] On 24 June 2017, *The Star* reported as follows:

> KUALA LUMPUR: A Royal Commission of Inquiry (RCI) could help reveal more details on the foreign exchange losses suffered by Bank Negara Malaysia (BNM) in the 1980s and 1990s, said Tan Sri Sidek Hassan.
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> ...
>
> ... So that is why the RCI is better, although it is safe to say that the STF (Special Task Force) has reason to believe that the actual loss is different and much more than the figures given earlier'. Said Sidek, a former chief secretary to the Government.
>
> ...
>
> On June 21, the STF submitted its findings, concluding that it found a prima facie case to merit an indepth investigations by establishing an RCI.

[12] As the first and the fourth respondents were part of the task force, which has made a prima facie case premised on the interviews and documents that they have perused, it is the stand of the applicant that the first and the fourth respondents have already applied their minds to the said evidence and therefore '... semestinya minda dan pemikiran kedua-dua mereka ini sudah terjejas dan/atau terprejudis..sebelum mereka bersidang ...'.

[13] The applicant states that the rules of natural justice must be adhered to at all times by the RCI, and that the inclusion of both the first and the fourth respondents as members of the RCI therefore lead to questions on the 'kebebasan dan neutrality' of the RCI.

[14] Therefore, when the RCI commenced its hearing on 8 August 2017, the applicant's lawyer applied to disqualify the first and the fourth respondents on the grounds of bias and prejudice as they were members of the task force that inquired into the subject matter of the RCI.

[15] The oral application to disqualify both the first and the fourth respondents were dismissed by the RCI.

[16] Hence, the applicant filed this application seeking leave under O 53 of the ROC 2012 for the orders of certiorari and mandamus.

A THE FINDINGS OF THE COURT

[17] It is common ground that the test for leave to commence with judicial review was held by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, to be as follows:

B

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though, ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

C

[18] Learned counsel for the applicant submit that leave must be granted as the application is not frivolous or vexatious. The applicant submits that since the first and the fourth respondents have had access to the documents and made a prima facie case and/or pre determination on the subject matter of the inquiry, then there is a breach of the principles of natural justice premised on bias and prejudice.

D

E **[19]** In *MP Jain's Administrative Law in Malaysia and Singapore* (3rd Ed), it is stated that natural justice is a procedural safeguard against improper exercise of power by a public authority. Natural justice has two elements — the right to be heard (*audi alteram partem*) and the rule against bias.

F **[20]** Learned counsel for the applicant relied on two cases — *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 and *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA). Both cases deal with the issues of natural justice. The applicant relied on the rule against bias, in that the commissioners of the RCI should be impartial, neutral and be in a position to apply their minds objectively. Since both the first and the fourth respondents' minds have been tainted with the evidence leading to findings of prima facie case by the task force, of which they were members, the applicant submits that there is a breach of the rule of natural justice and therefore leave should be granted.

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H **[21]** Learned senior federal counsel, Datuk Amarjeet Singh objected to the leave application on the basis that the application does not satisfy the low threshold in *WRP Asia Pacific* case, that based on established legal principles, the application does not pass the low threshold requirement.

I **[22]** Having considered the application and the submission of both parties, I am of the considered opinion that the application does not meet the threshold requirements based on the following reasons.

[23] Order 53 rr 1 and 2 of the ROC 2012, specifically provides the reliefs

that can be applied in an application for judicial review. Order 53 r 1(1) reads:

> This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1976 and for the purposes therein specified.

[24] The reliefs under para 1 of the Schedule include, inter alia, orders in the nature of certiorari, mandamus, prohibition, *quo warranto.* The relief of certiorari is to quash decisions while mandamus is a relief against an 'omission' and is subject to Chapter VIII of the Specific Relief Act 1950. Prohibition is a relief to check unlawful actions in the exercise of a public function whilst *a quo warranto* is used to challenge the appointment of a person to a public office in the case where he is not qualified to hold that office or his appointment suffers from any legal flaw.

[25] Added to that, O 53 r 2(2) provides that an application for judicial review may include a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

Leave for an order of certiorari

[26] The decision that the applicant is seeking to quash is the decision of the RCI which had refused the applicant's application to disqualify the first and the fourth respondents.

[27] It is not in dispute that the powers to appoint the members of the RCI rests with the YDPA under s 2 of Act 119, which reads:

> 2(1) The Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorizing the Commissioners to enquire into —
>
> (a) the conduct of any federal officer;
>
> (b) the conduct or management of any department of the public service of Malaysia;
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> (c) the conduct or management of any public institution which is not solely maintained by State funds; or
>
> (d) any other matter which an enquiry would, in the opinion of the Yang di-Pertuan Agong, be for public welfare ...

[28] Under s 4 of Act 119, the YDPA may appoint new members to replace any person who has resigned, died or desires to be discharge. Section 4 reads:

> 4 Power to add or substitute Commissioners

A (1) The Yang di-Pertuan Agong or the State Authority, as the case may be, may from time to time, add to the persons named in any such Commission, and in case any person appointed or added under this Act dies or resigns or desires to be discharged or refuses or becomes incapable of acting, the Yang di-Pertuan Agong or the State Authority, as the case may be, may appoint a new Commissioner in his place, and all
B the powers and duties by this Act conferred and imposed on a Commissioner shall be exercised and performed by the Commissioner so added or appointed ...

[29] As both ss 2 and 4 of Act 119 vest the powers on the appointment, addition or substitution of commissioners in the discretion of the YDPA,
C therefore the RCI has no power on the appointment and/or removal of its commissioners. As such, the RCI has correctly refused to accede to the applicant's application to disqualify the first and the fourth respondents.

Leave for an order of mandamus

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[30] The applicant seeks leave to commence judicial review proceedings, for an order of mandamus to compel the seventh respondent to immediately advice the YDPA under art 40(1) and (1A) of the Federal Constitution to cancel or terminate the appointments of the first and the fourth respondents.
E

[31] In respect of mandamus, O 53 r 1(2) of the ROC 2012 provides that this order (O 53) is subject to the of Chapter VIII of Part 2 of the Specific Relief Act 1950 ('the SRA'), which reads:

F CHAPTER VIII

ENFORCEMENT OF PUBLIC DUTIES

44 Power to order public servants and others to do specific acts

G (1) A Judge may make an order requiring any specific act to be done or forborne, by a person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

H (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

I (c) in the opinion of the Judge the doing and forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate remedy; and

(e) the remedy given by the order applied will be complete.

[32] In *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123, the Federal Court held at p 142:

> [38] In MP Jain's *Administrative Law in Malaysia and Singapore*, 2nd Ed, 1980, the learned author said, at pp 449–450:
>
> ... Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. Mandamus is thus a very wide remedy which is available against a public officer to see that he does his duty.
>
> *What can be enforced through mandamus is a duty of a public nature the performance of which is imperative and not optional or discretionary with the authority concerned. Thus, if an officer has a power rather than a duty, and he does not use his power, mandamus cannot be issued*. (Emphasis added.)

[33] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, Sharma J held at p 182/A-D that there are four prerequisites essential to the issue of an order for mandamus:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

(c) whether such duty of an imperative ministerial character involving no judgment or discretion on part of the respondent; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[34] The same position was taken by Justice Richard Malanjum (as His Lordship then was) in the case of *Workon Sdn Bhd v The Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 where His Lordship held that where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, mandamus may be issued. But if an officer has power and not duty under the law, and if he does not use his powers, mandamus is not issued to compel him to exercise his power.

[35] Therefore, under s 44(1) of the SRA, this court may issue an order of mandamus asking the authority to perform a public duty imposed on it where the public duty is prescribed by law. Thus, an order of mandamus can only be granted when there is a legal duty imposed on the public authority, and it does not perform the same.

[36] However, since both ss 2 and 4 of Act 119 uses the word 'may', the

appointment and replacement of the Commissioners are at the discretion of the YDPA. As such, there is no issue of statutory duty here. In *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd*, the Federal Court held at p 142:

> [40] It is clear from the aforesaid passages that the order of mandamus could be issued to enforce the performance of public duty where there has been a failure to perform the same. However, *it cannot be used as a remedy to compel the exercise of a power by any person or authority*. (Emphasis added.)

[37] Added to that, s 4 of Act 119 provides specific situations whether to add or substitute Commissioners, namely where the person appointed 'dies or resigns or desires to be discharged or refuses or becomes incapable of acting'. As such, any change to the composition of the RCI is limited to the said grounds only.

[38] With regards to the appointment of the commissioners by the YDPA, whether under s 2 or 4 of Act 119, the YDPA acts on the advice of the cabinet or a minister under art 40(1) and 40(1A) of the Federal Constitution, which provides as follows:

> 40 Yang di-Pertuan Agong to act on advice
>
> (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; and shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
>
> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with the advice on advice, or shall considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with the advice.

[39] In the present application, the applicant is seeking a mandamus to direct the seventh respondent, the Government of Malaysia to advice the YDPA under art 40(1) and (1A) of the Federal Constitution to cancel or terminate the appointments of the first and the fourth respondents. However, art 40(1) and 40(1A) of the Federal Constitution makes reference only to the cabinet or a minister, not the Government of Malaysia. Therefore, since the cabinet or the minister have not been named as parties in this application, the application for leave for an order of mandamus against the Government of Malaysia is clearly misconceived as the seventh respondent is not the cabinet or the minister specified in art 40(1) and 40(1A).

[40] In any event, even if the cabinet or the minister had been named as the

respondents, mandamus under s 44 of the SRA would also not lie against them. Under s 44 of the SRA, an order of mandamus can only be issued against a public officer, corporation or any court subordinate to the High Court.

[41] In *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175, the High Court held that both Government of Malaysia and the Minister are not public officers within the meaning of s 44 of the SRA 1950:

> However, according to sub-s (1) of s 44 of the Specific Relief Act 1956, an order can only be made against any person holding a public office ... According to s 3 of the Interpretation Act 1967, 'public officer' means office in any public services, and 'public services' means the public services mentioned in art 132(1) of the Federal Constitution. *Therefore, the first and second respondents in this case, namely the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri, Malaysia who are not persons holding a public office within the meaning of s 44 of the Specific Relief Act* have, in my view, been wrongly cited as the respondents. (Emphasis added.)

[42] The above case was cited with approval by the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 where the court held at p 651:

> [24] It is clear that the Minister of Finance, Government of Sabah is 'member of the administration' but not a 'person holding public office'. What it means, in relation to s 44 of the SRA is that s 44 of the SRA is not applicable to the appellant, meaning that an order under s 44 of the SRA cannot be issued against the appellant. To that extent the High Court judge, Gunn Chit Tuan J, was right in *Loh Wai Kong* regarding the effect of s 44 of the SRA on the Government of Malaysia and the Minister of Home Affairs.

[43] Therefore, premised on s 44 of the SRA, a mandamus does not lie against the seventh respondent and the application for leave for an order of mandamus has no legal basis.

[44] In any event, I am bound by the decision of the Federal Court in *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490, where leave to challenge the findings of the RCI was dismissed, inter alia, premised on public interest. At p 505, the court held as follows:

> [41] ... We are of the view that there is a strong policy consideration that it is against public interest to allow the findings of the Commission to be challenged in our courts. This was recognized by Rose CJ many years ago in *In Re Application by Ong Eng Guan for an order of prohibition in re appointment of SHD Elias* [1959] 1 MLJ 92. In that case it was an application for an order of prohibition to restrain a commissioner appointed under the Inquiry Commissions Ordinance on the

A ground that he was biased. The attorney general raised a preliminary objection, inter alia, that the writ of prohibition does not lie against a commissioner appointed under the Inquiry Commissions Ordinance.

...

B [43] ... If the proceedings of the commission are allowed to be challenged either at the *outset* or during its continuance by prohibition or its conclusion by certiorari, its purpose will come to a naught. It will make the setting up of the commission a meaningless exercise, and also a waste of money.

C **[45]** In the present case, the factual matrix is similar to the case of *In Re Application by Ong Eng Guan for an Order of Prohibition in Re Appointment of SHD Elias* [1959] 1 MLJ 92 where the application is for an order of prohibition to restrain a Commissioner appointed under the Inquiry Commissions Ordinance on the ground that he was biased. In allowing the
D preliminary objection raised by the attorney general, Rose CJ held as follows:

... looking at the matter broadly from the point of view of the public interest, it seems to me that the usefulness of Commissions of Inquiry would be impaired if their proceedings were allowed to be challenged either at the outset or during its continuance by prohibition or its conclusion by certiorari.

E ...

In my opinion, therefore both public interest and past practice point irresistibly to the conclusion that that the correct view is that neither of these two writs, certiorari or prohibition, lie in the case of a Commission of Inquiry.

F **[46]** Therefore, since it is against public interest to challenge the proceedings of the RCI, whether at the outset or during its continuance or at its conclusion, this application for leave is without merit, is frivolous and vexatious and must be dismissed.

G CONCLUSION

[47] To conclude, the application is dismissed with no order as to costs.

H *Application for leave dismissed with no order as to costs.*

Reported by Fatin Mohd Ismail

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